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DIV. OF OIL, GAS & MINING

Division
BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH

IN THE MATTER OF THE)	MEMORANDUM IN SUPPORT OF
ADMINISTRATIVE APPEAL OF)	APPLICATION FOR SMALL
APPLICATION DENIAL, REQUEST)	MINING PERMIT
FOR AGENCY ACTION,)	
WRIGHT/GARFF RESOURCES, STAR)	Cause No. S/043/030
STONE QUARRIES, INC., SUMMIT)	M/043/0012
COUNTY, UTAH)	
)	

COMES NOW Wright/Garff, L.L.C., by and through its counsel of record, Steven A. Wuthrich, and hereby submits its Memorandum in Support of Application for Small Mining Permit as follows:

FACTS

1. Thomas American Stone and Building, Inc., now Lon Thomas and Associates (hereinafter "Thomas"), is the owner of the surface rights to Lot 38, in Brown's Canyon, Summit County, State of Utah.
2. Wright/Garff Resources, L.L.C. (hereinafter "Wright/Garff") is the owner of 95.5 percent interest in the mineral rights underlying Lot 38.
3. On or about January 13, 1987, an Order Granting Motion for Partial Summary Judgement was entered in Summit County, Case No. 94-03-00111, as well as a corresponding judgment

of the same date, all of which was recorded as Instrument No. 00474230 in the Summit County Recorder's Office. Said decision defines "surface rights" on Lot 38 as:

"...includes the surface soil and other materials lying on the immediate natural surface of the land, vegetation growing on the surface and the right to construct structures on the surface and to use the surface for surface uses, such as farming, ranching, residential, commercial, industrial or recreational purposes, together with the right to penetrate the surface incidentally to the exercise of surface rights (e.g. for foundations, footings, basements, water lines and sewer lines).

The Court's judgement goes on to quiet title in Wright/Garff Resources, L.L.C.,

"...in and to an undivided 86.76111 percent¹ in an to all building, stone and other minerals, and 100 percent of all sub-surface materials and rights in and under the following described real property in Summit County, Utah, together with the right of ingress, egress and reasonable surface use to prospect for, mine and remove same, including without limitation the right to utilize the surface or open pit mining and/or quarrying methods. . .[legal description for Lot 38]."

4. In 1996 Wright/Garff Resources leased the mineral rights to Thomas American Stone and Building, Inc. Another lease was entered into in the year 2000, which terminated of its own accord in November of 2005.
5. Since November of 2005, neither Lon Thomas and Associates (as name change successor to Thomas American Stone and Building, Inc.,) nor Star Stone Quarries have had any interest in the mineral rights on Lot 38, save and except solely a small portion of approximately three to four acres of BLM ground in Lot 38, of which Thomas holds a mineral lease with the BLM.
6. Mr. Rogers checked with the BLM and found that monthly mining reports have not been

¹Wright/Garff has acquired subsequent additional mining interests and now holds a 95.5 percent interest.

- filed by Lon Thomas indicating that he could not see any mining activities have been going on in that BLM ground lease. (See transcript of the March 1, 2006 meeting, hereinafter “Tr.” Tr. page 46, line 2-9.) Mr. Rogers, himself, had visually observed the property as of two weeks prior to the meeting of March 1, and he found that no mining activity was going on.
7. Thomas states that it desires to: (1) continue its operation of splitting, (2) continue extracting from the BLM property and having a crushing operation, and (3) fulfill its reclamation obligations. Thomas claimed that “part of his permit allows him to bring the stone from the adjoining property and split it.” And that part of its permit allows it to crush the limestone. (Tr. p. 53, l. 20-25; p. 55, l. 1-5.)
 8. However, as noted by Ms. White, Thomas’ existing permit does not specifically discuss those activities. (Tr. p. 55, l. 13-14.)
 9. Even Thomas admits that the parties could co-exist on Lot 38. (Tr. p. 56, l. 12.)
 10. Thomas then further asserts that the Division of Oil, Gas and Mining (hereinafter “Division”) can’t grant Wright/Garff a mining permit because Wright/Garff only has 95 percent of the mineral rights. (Tr. p. 57, l. 20-25; p. 58, l. 1, 2.) However, the Division has already granted Lon Thomas a permit to mine since 1996 on Lot 38 based upon Wright/Garff Resources leasehold. In other words, Thomas is now suggesting that the Division should have never granted its permit to begin with. Thomas argument is entirely disingenuous and will be discussed in the judicial estoppel portions of the brief.
 11. The Division’s position is that Star Stone Quarries is validly permitted, that they are conducting mining activities and there’s nothing they can do to revoke that permit under the rules, citing Sec. 40-8-16. (Tr. p. 61, l. 11-25.)

12. Thomas could have, but did not, notify the Division of the termination under its lease. Because he failed to note the substantial change in his mining operation to the Division, the Division has not exercised its authority to reevaluate the situation or the permit. However, that should not relieve either Thomas of its duty to amend, modify or have suspended its mining application, nor does it relieve the Division of their duty of overseeing Thomas' activities, even assuming that the present activities somehow fall within the definition of "mining activity".
13. Thomas did not submit any amendment or notice to the Division that his mining activities had substantially been altered as a result of the termination of the lease, i.e. it changed from a quarrying and on-site processing to off-premise processing only.

ISSUES

- I. Should Lon Thomas be estopped from claiming any deficiency of Wright/Garff's mineral interest, inasmuch as Thomas' original permit application to mine was promised upon a mineral lease with Wright/Garff?
- II. Does the Division have authority to revoke, modify, suspend or alter Thomas' mining permit so as to permit Wright/Garff's application?
- III. Would failure to allow Wright/Garff's application constitute a "taking," in violation of constitution provisions?

ARGUMENT AND AUTHORITIES

- I. Lon Thomas would be estopped from claiming any deficiency of Wright/Garff's mineral interest, inasmuch as Thomas' original permit application to mine was premised upon a mineral lease with Wright/Garff, under principals of ordinary estoppel and judicial estoppel.

In *Williams v. Public Service Comm.*, 794 P.2d (Utah 1980 1988), the court held that there are three elements to equitable estoppel: (1) an admission, statement or act inconsistent with the claim afterward asserted, (2) action by the party on the faith of such admission, statement or act, and (3) injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement or act.

In this case, Wright/Garff had leased to Thomas, who obtained a valid mining permit from the Division. To now allow Thomas to say that Wright/Garff cannot obtain a permit from the Division because its title is somehow deficient completely contradicts the issuance of the original permit to Thomas, and is equitably unconscionable. It is tantamount to trifling with proceedings under the principle under judicial estoppel.

The doctrine of judicial estoppel, sometimes referred to as the doctrine of preclusion of inconsistent positions, is invoked to prevent a party from changing its position over the course of judicial proceedings when such positional changes have an adverse impact on the judicial process. See 1B *Moor's Federal Practice*, ¶ .405[8], at 238-42 (2d Ed. 1998). "The policies underlying preclusion of inconsistent positions are "general consideration [s] of the orderly administration of justice and regard for the dignity of judicial proceedings" *Arizona v. Shamrock Foods Co.*, 729 F. 2d. 1208, 1215 (9th Cir. 1984), *cert denied*, 469 U.S. 1197, 105 S.Ct. 980, 83 L.Ed.2d 982 (1985) (citations omitted). Judicial estoppel is "intended to protect against a litigant playing "fast and loose with the courts." *Rockwell International Corp. V Hanford Atomic Metal trades Council*, 851 F.2d 1208, 1210 (9th Cir. 1988) (citations omitted). Because it is intended to protect the integrity of the judicial process, it is an equitable doctrine invoked by a court at its discretion.... Judicial estoppel is most commonly applied to bar a party from making a factual assertion in a legal proceeding which directly contradicts an earlier assertion made in the same proceeding or a prior one. See generally Note, *Judicial Estoppel: The Refurbishing of a Judicial Shield*, 55 Geo.Wash.L.Rev. 409, 410-12 (1987); Comment, *Precluding Inconsistent Statements: The Doctrine of Judicial Estoppel*, 80 Nw.U.L.Rev. 1244 (1986).

In *Pegram v. Herdrich*, 530 U.S. 211, 120 S.Ct. 2143, 147 L.Ed. 2d 164 (2000) the Supreme Court held that the doctrine of judicial estoppel generally prevents a party from prevailing on

contradictory arguments they had made to prevail in another phase of that same case. More recently, in *New Hampshire v. Maine*, 532 U.S. 121 S.Ct. 1808, 149 L.Ed. 2d 968 (2001) the court specifically adopted the issue of judicial estoppel holding “under the doctrine of judicial estoppel were a party assumes a certain position of legal proceeding and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who acquiesced in the position formally taken by him.”

“Judicial estoppel” generally prevents a party from prevailing in one phase of a case in an argument and then relying on a contradictory argument to prevail in another phase. The purpose of judicial estoppel is to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment.” *Id.*

The principle, while denominated judicial estoppel, is sometimes referred to as a doctrine which estops a party to play fast and loose with the courts or to trifle with judicial proceedings. It is an expression of the maxim that one cannot blow hot and cold in the same breath. *Allen v. Allen*, 550 P.2d 1137 (Wyo. 1976). *See also, McKay v. Owens*, 130 Idaho 148, 937 P.2d 1222 (Idaho 1997); *Citizens Bank v. C & H Construction & Paving Co.*, 89 N.M. 360, 552 P.2d 796 (N.M. 1976).

Thomas, having enjoyed the benefits of Wright/Garff’s mineral lease for some 10 years, now seeks to complain that title to those minerals is somehow insufficient; It was sufficient enough for Thomas to mine under- - - why not for Wright/Garff?

II. The Division has the authority to revoke, modify, suspend or alter Thomas’ mining permit so as to permit Wright/Garff’s application.

Several Utah Board of Oil, Gas and Mining Regulations are pertinent to the issues in this case. Rule R647-1-106 provides in relevant part:

“Disturbed Area” means the surface land disturbed by mining operations. The disturbed area for small mining operations shall not exceed five acres. The disturbed area for large mining operations should not exceed the acreage described in the approved notice of intention.”

“Exploration” means the surface disturbing activities conducted for the purpose of discovering a deposit or mineral deposit delimiting the boundaries of a deposit or mineral deposit and identifying regions or specific areas in which the deposits or mineral deposits are likely to exist. “Exploration” includes, but is not limited to: Sinking shafts; tunneling; drilling holes; digging pits or cuts; building roads or other access ways.

“Large mining operations” means mining operations which have a disturbed area of more than five surface acres at any time.

“Mining operations” means those activities conducted on the surface of the land for the exploration for, development of, or extraction of a mineral deposit, including, but not limited to, the surface mining and the surface effects of underground and in situ mining; on site transportation, concentrating, milling, evaporation, or other primary processing. “Mining operation” does not include: The extraction of sand, gravel and rock aggregate; the extraction of oil and gas; the extraction of geothermal steam;; smelting or refining operations; off-site operations and transformation; reconnaissance activity; or activities which will not cause significant surface resource disturbance and do not involve the use of mechanized earth moving equipment, such as bulldozers or backhoes.”

“Small Mining Operations” means mining operations which have a disturbed area of five or less surface acres at any time.”

“Surface Mining” means mining conducted on the surface of the land, including open pit, strip, or auger mining; dredging; quarrying; leaching; surface of apparition operations; reworking abandoned dumps and tailings and activities related thereto. [*emphasis added.*]

In the present case, Lon Thomas holds a permit for a large mining operation. However, at the time Mr. Thomas obtained that permit it had a lease with Wright/ Garff to do quarrying on Lot 38. Inasmuch as his lease with Wright/Garff has been terminated, it no longer has any sub-surface rights to mine, save and accept solely the area of the BLM, which is less than five acres. The Division seems to have taken the position that Thomas may continue to have its large mining permit

based upon two premises: First, that Thomas is in fact mining limestone on the BLM portion, (which is less than five acres); and second, that Thomas is splitting and processing stone brought in from adjacent land on which Thomas has no mining permit. Neither of the above premises, in fact, supports continuation of the large mining permit.

First, Wright/Garff disputes that Thomas is mining at all on the BLM. It paid no royalties, there is no indicia of mining, and a significant portion of that area has been hampered by Thomas stacking Wright/Garff's boulders thereupon. With regard to the off-site processing now conducted on the surface lands, that processing is not "for the exploration for, development of, or extraction of a mineral deposit," nor does it involved mechanized earth moving equipment that causes significant surface resource disturbance. It is true that a loader is sometimes used to load the trucks, but not for disturbing the surface of Lot 38. Bulldozers and backhoes are no longer being used on Lot 38 (although previously a track hoe was used for the express purpose of quarrying).

It's understandable that the Division would want to define "mining operation" as broad as possible so as to maximize its own jurisdiction. However, when one reads the definition of mining operations as a whole, it has to be tied to exploration for development of mineral deposits and causing of surface disturbance on the subject property. Same is not occurring in this case. All that is presently occurring is off-site rock splitting and loading, having nothing to do with any mining for which Thomas has a permit! Thomas is simply splitting rock which he purchases from a neighbor who has a permit. Thomas could do this activity anywhere—without a mining permit.

Rule R647-4-117, Notification of Suspension or Termination of Operations, provides as follows:

1. The operator need not notify the Division of the temporary suspension of

mining operations.

2. In the case of a termination of a suspension of mining operations that has exceeded, or is expected to exceed two (2) years, the operator shall, upon request, furnish the Division with such data as it may require to evaluate the status of the mining operation, the status of compliance with these rules, and the probable future status of the land affected. Upon review of such data, the Division will take such action as may be appropriate. The Division may grant an extended suspension period if warranted by a showing of good cause by the operator.

3. The operator shall give the Division prompt written notice of a termination or suspension of large mining operations expected to exceed five (5) years. Upon receipt of notification, the Division shall, within 30 days, make an inspection of the property.

4. Large mining operations that have been approved for an extended suspension period will be reevaluated on a regular basis. Additional interim reclamation or stabilization measures may be required in order for a large mining operation to remain in a continued state of suspension. Reclamation of a large mining operation may be required after five (5) years of continued suspension. The Division will require complete reclamation of the mine site when the suspension period exceeds 10 years., unless the operator appeals to the Board prior to the expiration of the 10-year period and shows good cause for a longer suspension period. [*emphasis added.*]

In fact, the Division relies upon U.C.A. §40-8-16(2) for its proposition that it cannot revoke or withhold Thomas' mining permit. Said section provides:

(2) The board or the division shall not withdraw approval of a notice of intention or revision of it, except as follows:

(a) Approval may be withdrawn in the event that the operator substantially fails to perform reclamation or conduct mining operations so that the approved reclamation plan can be accomplished.

(b) Approval may be withdrawn in the event that the operator fails to provide and maintain surety as may be required under this chapter.

(c) Approval may be withdrawn in the event that mining operations are continuously shut down for a period in excess of five years, unless the extended period is accepted upon application of the operator. [*emphasis added*]

However, §40-8-17(1) provides:

(1) The approval of a notice of intention shall not relieve the operator from

responsibility to comply with all other applicable statutes, rules, regulations, and ordinances, including but not limited to, those applying to safety, air and water pollution, and public liability and property damage. [emphasis added]

And §40-8-18 provides:

(1)(a) Since mining operations and related reclamation plans may need to be revised to accommodate changing conditions or new technology, an operator conducting mining operations under an approved notice of intention shall submit to the division a notice of intention when revising mining operations.

(b) The notice of intention to revise mining operations shall be submitted in the form required by the rules promulgated by the board.

(2)(a) The notice of intention to revise mining operations will be designated as an amendment to the existing notice of intention by the division, based on rules promulgated by the board.

(b) An amendment of a notice of intention will be reviewed and considered for approval or disapproval by the division within 30 days of receipt of a notice of intention to revise mining operations.

(3)(a) A notice of intention to revise mining operations, if not designated as an amendment of a notice of intention as set forth in Subsection (2), shall be processed and considered for approval by the division in the same manner and within the same time period as an original notice of intention.

(b) The operator shall be authorized and bound by the requirements of the existing notice until the revision is acted upon and any revised surety requirements are established and satisfied.

(4)(a) If a change in the operation occurs, a mining operation representative shall submit an amendment to the notice of intention.

(b) Although approval of an amendment to the notice of intention by small mining operations is not required, a revised surety shall be filed by the permittee prior to implementing the amended notice of intention. [emphasis added]

In November, 2005, a substantial change took place in Thomas' mining operations. Thomas was no longer able to continue quarrying and doing on-premise processing, but rather changed to an off-premise processing site with no quarrying or exploration for minerals occurring on Lot 38. Rather than complying with the Divisions rules and Utah statutes by giving notice and either amend or submit a change request, Thomas did nothing.

By non-compliance with the statues cited above, Thomas now seeks to benefit and block

Wright/Garff from the latter entity's lawful property rights. The Division has a duty to see that Thomas complies with the rules and regulations, and when a substantial change in the mining operation has occurred, require him to make the appropriate amendments. This the Division has failed to do. The Division cannot complain that it is somehow impotent to act under the circumstances of this case, when it has not required Thomas as a mining permittee to comply with the statutes, regulations and ordinances in effect.

The Division could very easily require that Thomas amend his mining permit and require that the amendment leave available sufficient area for Wright/Garff to conduct its mining activities as well. If the Division fails to do this, it will undoubtedly constitute a taking of Wright/Garff's property.

III. Failure to allow Wright/Garff's application would constitute a "taking," in violation of constitutional provisions.

Article 1, Sec. 22 of the Utah Constitution (as well as the Fifth Amendment to the United States Constitution) prevents the taking of private property for a public use. In the present case, all Wright/Garff owns relative to Lot 38 is the mineral interest. A preclusion by the division of their right to exercise mineral development is in essence, a taking of the whole property since the mineral estate is the entire estate owned by Wright/Garff in the subject lands.

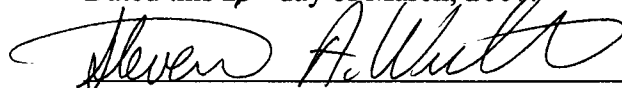
Utah recognizes causes of action for inverse condemnation. *Katsos v. Salt Lake City Corp.*, 634 F. Supp. 100 (D Utah 1986). *See also, Anderson v. Alpine City*, 804 F. Supp. 269 (Utah 1992). If the Division were to deny this permit, essentially 100 percent of the value of Wright/Garff's ownership of its mineral interest would be taken. Wright/Garff would be left with no choice but to file an inverse condemnation action against the State, all of which could be avoided by making

Thomas comply with the rules and regulations and granting the small mining permit as requested.

CONCLUSION

For the foregoing reasons, the application for small mining permit submitted by Wright/Garff should be granted.

Dated this ⁶28th day of March, 2007



STEVEN A. WUTHRICH
Attorney for Wright/Garff

CERTIFICATE OF SERVICE

I hereby certify that on this ⁷29th day of March, 2007 the undersigned faxed a true and correct copy of the foregoing document to the following:

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